UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. H-01-3624 (Consolidated)
This Document Relates To:	
MARK NEWBY, et al., Plaintiffs, vs. ENRON CORP., et al., Defendants.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS OF DEFENDANTS BARCLAYS PLC, BARCLAYS BANK PLC AND BARCLAYS CAPITAL INC.

David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
Adam R. Brebner
Steven J. Purcell
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Facsimile: (212) 558-3588

Barry Abrams
Southern District I.D. No. 2138
State Bar. No. 00822700
ABRAMS SCOTT & BICKLEY, L.L.P.
700 Louisiana, Suite 1800
Houston, Texas 77002
(713) 228-6601
Facsimile: (713) 228-6605

Attorneys for Defendants Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.

Dated: July 31, 2003

1603

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

I. ALL CLAIMS AGAINST BARCLAYS CAPITAL AND BARCLAYS BANK ARE TIME-BARRED 3

A. The Statute of Limitations in Sarbanes-Oxley Does Not Apply Here 3

B. The Applicable One-Year Limitations Period Expired Before Plaintiffs Filed the Amended Complaint. 3

1. Plaintiffs Had Actual Notice More than One Year Before They Filed Their Amended Complaint. 3

2. Plaintiffs Had Inquiry Notice of Enron's Alleged Fraud in the Fall of 2001. 4

C. The Claims Asserted in the Amended Complaint Against Barclays Capital and Barclays Bank Do Not "Relate Back" to the Date of the Filing of the Consolidated Complaint Under Rule 15(c)(3). 9

1. Plaintiffs' Claimed Lack of Knowledge Is Not a Mistake Under Rule 15(c)(3). 10

2. Plaintiffs' Flawed Legal Strategy Is Not a Mistake under Rule 15(c)(3). 11

II. ALL OF PLAINTIFFS' CLAIMS CONCERNING THE YOSEMITE SECURITIES OFFERING SHOULD BE DISMISSED 13

A. No Named Plaintiff Has Standing to Assert the Claims. 13

B. The Yosemite Securities Offering Was Not Made Pursuant to a Prospectus. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Advanced Magnetics, Inc. v. *Bayfront Partners, Inc.*,
1994 WL 324018 (S.D.N.Y. July 6, 1994) 12

Barrow v. *Wethersfield Police Department*,
66 F.3d 466 (2nd Cir. 1996) 11

Baskin v. *City of Des Plaines*,
138 F.3d 701 (7th Cir. 1998) 11

Bay Area Laundry v. *Ferbar Corp.*,
522 U.S. 192 (1997) 6

Brown v. *Sibley*,
650 F.2d 760 (5th Cir. 1981) 14

Central States v. *Navco*,
3 F.3d 167 (7th Cir. 1993) 6

Duckworth v. *Brunswick Corp.*,
2001 WL 406234 (N.D. Tex. April 17, 2001) 11

Dyniewicz v. *United States*,
742 F.2d 484 (9th Cir. 1984) 6

Griffin v. *PaineWebber, Inc.*,
84 F. Supp. 2d 508 (S.D.N.Y. 2000) 15

Gutierrez v. *Raymond International, Inc.*,
86 F.R.D. 684 (S.D. Tex. 1980) 12, 13

Jacobsen v. *Osborne*,
133 F.3d 315 (5th Cir. 1998) 9

Jensen v. *Snellings*,
841 F.2d 600 (5th Cir. 1988) 5

Kemp Industries, Inc. v. *Safety Light Corp.*,
1994 WL 532130 (D. N.J. Jan. 25, 1994) 10

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*,
501 U.S. 350 (1991) 5

Lewis v. *Casey*,
518 U.S. 343 (1996) 14

Longden v. *Sunderman*,
123 F.R.D. 547 (N.D. Tex. 1988) 15

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 15

Lundblad v. *Celeste*,
874 F.2d 1097 (6th Cir. 1989) 6

Martinez Tapia v. *Chase Manhattan Bank, N.A.*,
149 F.3d 404 (5th Cir. 1998) 6

McDaniel v. *Johns-Manville Sales Corp.*,
542 F. Supp. 716 (N.D. Ill. 1982) 6

O'Shea v. *Littleton*,
414 U.S. 488 (1974) 13

In re Paracelsus Corp. Securities Litigation,
6 F. Supp. 2d 626 (S.D. Tex. 1998) 14

Rahr v. *Grant Thornton LLP*,
142 F. Supp. 2d 793 (N.D. Tex. 2000) 5, 7

Reed v. *Prudential Securities. Inc.*,
875 F. Supp. 1285 (S.D. Tex. 1995) 5

Roberts v. *Orleans Parish Medical Staff*,
2002 U.S. Dist. LEXIS 9660 (E.D. La. 2002) 9

In re Securities Litigation BMC Software, Inc.,
183 F. Supp. 860 (S.D. Tex. 2001) 7

Slater v. *Skyhawk Transportation, Inc.*,
187 F.R.D. 185 (D. N.J. 1999) 11

Swenson v. *Engelstad*,
626 F.2d 421 (5th Cir. 1980) 16

Topalian v. *Ehrman*,
954 F.2d 1125 (5th Cir. 1992) 5

Westchester Corp. v. *Peat, Marwick, Mitchell & Co.*,
626 F.2d 1212 (5th Cir. 1980) 7

Whitlock Corp. v. *Deloitte & Touche, LLP*,
233 F.3d 1063 (7th Cir. 2000) 6, 7

Wilson v. *United States*,
23 F.3d 559 (1st Cir. 1994) 11

STATUTES

15 U.S.C. § 77l ..... *passim*

15 U.S.C. § 77m 3

15 U.S.C. § 77o ..... *passim*

15 U.S.C. § 78j ..... *passim*

15 U.S.C. § 78t ..... *passim*

RULES

Fed. R. Civ. P. 15 ..... *passim*

Defendants Barclays PLC, Barclays Bank PLC ("Barclays Bank") and Barclays Capital Inc. ("Barclays Capital") (collectively, "Barclays") respectfully submit this reply memorandum of law in further support of their motion to dismiss (i) all claims asserted in the First Amended Consolidated Complaint (the "Amended Complaint") against Barclays Capital and Barclays Bank, and (ii) the "controlling person" claims asserted against Barclays PLC under Section 15 of the Securities Act of 1933 (the "1933 Act") and Section 20(a) of the Securities Exchange Act of 1934 (the "1934 Act").

PRELIMINARY STATEMENT

Plaintiffs' opposition ("Opp. Mem.") confirms that all the claims asserted against Barclays Capital and Barclays Bank are barred by the applicable one-year statutes of limitations. Plaintiffs nowhere contest — nor could they — that when they filed their Consolidated Complaint on April 8, 2002 (which did not assert any claims against Barclays Capital or Barclays Bank), they already had *actual notice* of the matters forming the basis for the claims now being asserted in the Amended Complaint against Barclays Capital and Barclays Bank, and had *actual notice* of the alleged involvement of Barclays Capital and Barclays Bank in those matters. Accordingly, the one-year statutes of limitations began to run on all claims against Barclays Capital and Barclays Bank on April 8, 2002 at the very latest (and in fact much earlier), and expired on April 8, 2003. But the claims against them, and the derivative "controlling person" claims against Barclays PLC, were not brought until May 14, 2003. They are time-barred.

All of plaintiffs' attempts to salvage their untimely claims are unavailing. First, as this Court has already held, the extended two-year statute of limitations provided by Sarbanes-Oxley does not apply to this action because it was commenced before the

enactment of Sarbanes-Oxley. Second, well over one year before suing Barclays Capital and Barclays Bank, plaintiffs had actual notice of the matters forming the basis of the claims now being asserted against them. Plaintiffs do not dispute this actual notice, but rather argue that "equitable estoppel" should preclude the statute of limitations defense. However, the estoppel argument (even if it were otherwise persuasive, and it is not) does not help either because plaintiffs' claims against Barclays Capital and Barclays Bank were time-barred as a result of inquiry notice even *before* the alleged acts that are the asserted basis for the estoppel argument. Finally, the claims asserted in the Amended Complaint against Barclays Capital and Barclays Bank do not "relate back" to the date of the filing of the Consolidated Complaint because there was no "mistake" that could trigger the application of Federal Rule of Civil Procedure 15(c)(3).

Plaintiffs also do not dispute that they lack standing to bring claims (§§ 12(a)(2) and 15 and Rule 10b-5) based on the Yosemite Securities Offering because no named plaintiff purchased any securities in that offering. Instead, plaintiffs ask the Court to defer ruling on the standing issue until class certification issues have been resolved. The Court should not wait; the Fifth Circuit has held that constitutional standing is a threshold jurisdictional question that needs to be addressed before class certification issues. Moreover, even if plaintiffs had standing (and they do not), the Section 12(a)(2) and 15 claims should be dismissed in any event for the independent reason that the Yosemite Securities Offering was not a public offering by means of a prospectus. Although plaintiffs now say that the Yosemite Securities Offering should be treated as public because the offering document was widely distributed, there are no such allegations in the Amended Complaint.

I. ALL CLAIMS AGAINST BARCLAYS CAPITAL AND BARCLAYS BANK ARE TIME-BARRED.

A. The Statute of Limitations in Sarbanes-Oxley Does Not Apply Here.

For the reasons stated in Citigroup's reply brief in further support of their motion to dismiss, which are expressly incorporated herein, the Court should reject plaintiffs' arguments that the two-year statute of limitations in Sarbanes-Oxley applies to this case. (*See* Citigroup Reply Br. at III B.)

B. The Applicable One-Year Limitations Period Expired Before Plaintiffs Filed the Amended Complaint.

If the Court correctly declines to apply Sarbanes-Oxley, all of plaintiffs' claims against Barclays Capital and Barclays Bank needed to be brought within one year after plaintiffs discovered, or with reasonable diligence should have discovered, the facts forming the basis of the alleged violations. (*See* Barclays' Mot. Dismiss at 7-8.) Here, all of plaintiffs' claims are time-barred based on both actual notice and inquiry notice.[1]

1. Plaintiffs Had Actual Notice More than One Year Before They Filed Their Amended Complaint.

Plaintiffs do not and could not contest that, when they filed the Consolidated Complaint on April 8, 2002, they had *actual notice* of the matters forming the basis of the claims now being asserted in the Amended Complaint against Barclays Capital and Barclays Bank, and had *actual notice* of the involvement of Barclays Capital

[1] Likewise, plaintiffs' derivative claims under Sections 20(a) of the 1934 Act and Section 15 of the 1933 Act, which are subject to the same limitations periods as the underlying Sections 10(b) and 12(a)(2) claims, are also time-barred. (*See* Barclays Mot. Dismiss at 10 n.7 (citations omitted).)

and Barclays Bank in those matters. Plaintiffs try to avoid facing this issue head-on as to Barclays by stating in their brief that they "did not have notice of *certain* Bank Defendants' conduct as of April 8, 2002." (Opp. Mem. at 16 (emphasis added).) But nowhere in their 115-page brief do plaintiffs claim that they lacked actual notice as to Barclays Capital and Barclays Bank when they filed the Consolidated Complaint on April 8, 2002. Nor could they, because plaintiffs went so far as to identify Barclays Capital in the earlier Consolidated Complaint, and repeatedly cited in that prior pleading the publicly available Powers Report, which identified and discussed Barclays Bank and its involvement in the Chewco transaction.[2] Accordingly, the one-year limitations period began to run on *all* claims asserted in the Amended Complaint against Barclays Capital and Barclays Bank on April 8, 2002 at the very latest (and in fact much earlier). Because these claims were not brought until May 14, 2003, they are time-barred and should be dismissed.

2. Plaintiffs Had Inquiry Notice of Enron's Alleged Fraud in the Fall of 2001.

Plaintiffs argue that Barclays Capital and Barclays Bank should be estopped from asserting their statutes of limitations defenses "for claims brought after January 27, 2003" because "the [b]ank [d]efendants induced the timing of Lead Plaintiff's amendment by failing to timely object [pursuant to the Court's January 27,

[2] *See* Consol. Compl. ¶ 106 ("Defendant Barclays PLC is a large integrated financial services institution that through its controlled subsidiaries and divisions (such as *Barclays Capital . . .*)") (emphasis added); Powers Report at 49, 50 ("240 million unsecured subordinated loan to Chewco from *Barclays Bank PLC*, which Enron would guarantee") (emphasis added); Consol. Compl. ¶¶ 800, 825, 830 (citing Powers Report).

2003 Order] on the basis that the banks' subsidiaries were real parties in interest." (Opp. Mem. at 15.) This "equitable estoppel" argument, however, is on its face not persuasive and, in any event, is neither here nor there because plaintiffs were on inquiry notice of Enron's alleged fraud in the fall of 2001. Thus, the claims against Barclays Capital and Barclays Bank were already time-barred *before* the Court entered the January 27, 2003 Order upon which the estoppel argument is based.

Plaintiffs incorrectly assert that the doctrine of inquiry notice does not apply in the Fifth Circuit. (*See* Opp. Mem. at 14.) As explained in Barclays' opening brief (at 7), the Fifth Circuit has held that the one-year discovery period applicable to claims under Section 10(b) begins to run on the date when the plaintiff discovers, *or in the exercise of reasonable diligence should have discovered*, the facts forming the basis of the alleged violation. *See Jensen* v. *Snellings*, 841 F.2d 600, 607 (5th Cir. 1988) (considering whether plaintiffs had "inquiry notice or actual notice" of alleged Section 10(b) claims); *see also Reed* v. *Prudential Sec. Inc.*, 875 F. Supp. 1285, 1288 (S.D. Tex. 1995) (same). Plaintiffs assert that *Reed* was not based on and "d[id] not address *Lampf*." (Opp. Mem. at 14 n.7.) Incorrect; *Reed* clearly relied on *Lampf* in holding that inquiry notice applies to Section 10(b) claims. *See Reed* at 1288 ("[i]t is not necessary for the plaintiff to have actual knowledge of fraud for the limitations period to begin to run") (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991)); *see also Topalian* v. *Ehrman*, 954 F.2d 1125, 1133 (5th Cir. 1992) (applying inquiry notice doctrine post-*Lampf*); *Rahr* v. *Grant Thornton LLP*, 142 F. Supp. 2d 793,

799 (N.D. Tex. 2000) ("knowledge of the possibility of a claim is sufficient to put a plaintiff on inquiry notice and to trigger commencement of the limitations period").[3]

Plaintiffs suggest that inquiry notice requires them to have known the existence of Barclays Capital's and Barclays Bank's participation in the alleged fraud, as opposed to having notice of the fraud generally, to trigger the running of the applicable one-year statutes of limitations. That is also incorrect. Inquiry notice requires only that the plaintiffs have notice of the mere "possibility of fraud, not . . . complete exposure of the alleged scam." *Martinez Tapia* v. *Chase Manhattan Bank, N.A.*, 149 F.3d 404, 410 (5th Cir. 1998) (quoting *Brumbaugh* v. *Princeton Partners*, 985 F.2d 157 (4th Cir. 1993)). Under the inquiry notice rule, the statute of limitations begins to run "with respect to *all* potentially responsible persons" when the plaintiff has notice of the alleged wrongful injury. *Whitlock Corp.* v. *Deloitte & Touche, LLP*, 233 F.3d 1063, 1066 (7th Cir. 2000) (emphasis in original); *accord Central States* v. *Navco,* 3 F.3d 167, 171 (7th Cir. 1993), *overruled on other grounds, Bay Area Laundry* v. *Ferbar Corp.,* 522 U.S. 192 (1997); *Dyniewicz* v. *United States*, 742 F.2d 484, 487 (9th Cir. 1984); *Lundblad* v. *Celeste*, 874 F.2d 1097, 1104 (6th Cir. 1989), *modified on other grounds*, 942 F.2d 627 (1991); *McDaniel* v. *Johns-Manville Sales Corp.*, 542 F. Supp. 716, 718 (N.D. Ill. 1982). Here, although plaintiffs say that they may not have known in the fall of 2001 "all

[3] Contrary to plaintiffs' suggestion that *Lampf* does not apply to cases involving Rules 10b-5(a) and (c) (*See* Opp. Mem. at 15), *Lampf* governs all claims under Section 10(b) and Rule 10b-5 thereunder. *See* 501 U.S. at 364 ("[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation").

potentially responsible persons," *Whitlock* at 1066, who purportedly participated in the alleged fraud, they concede that they were generally aware of the alleged fraud at that time. (*See* Opp. Mem. at 16 ("plaintiffs may have been on notice about Enron's fraud in the late fall of 2001").) This is sufficient to trigger inquiry notice under the cases cited above.

Plaintiffs indisputably had at least inquiry notice of the facts constituting the alleged violations now being asserted (i) by October 16, 2001, when Enron announced it was taking a billion dollar charge and reducing shareholder equity by over a billion dollars, (ii) by November 8, 2001, when Enron announced it was restating its financial statements back to 1997 in relation to, among other things, the specific transactions that form the basis of plaintiffs' allegations against Barclays,[4] and (iii) *a fortiori* by December 2, 2001, when Enron filed for bankruptcy. *Cf. Westchester Corp.* v. *Peat, Marwick, Mitchell & Co.*, 626 F.2d 1212, 1217-18 (5th Cir. 1980) (holding plaintiffs had a duty to investigate when auditors had withdrawn financial statement certification, had asked to withdraw from the audit unless released from liability, had been dismissed, and two lawsuits had been filed alleging fraudulent financial statements); *see also Rahr*, 142 F. Supp. 2d at 799. Furthermore, as noted in Barclays' opening brief (at 8 n.6), in December 2001, counsel for Lead Plaintiff filed a putative class action

[4] Indeed, Enron's November 2001 8-K states that "Chewco purchased a limited partnership in JEDI for $383 million, $132 million of which was financed by an interest-bearing loan from JEDI to Chewco, and $240 million of which was borrowed from a *third-party financial institution.*" (*See* Affidavit of Barry Abrams, dated July 31, 2003, attaching Enron's November 8, 2001 8-K as Exh. A, at 18 (emphasis added).) The Court may consider Enron's 8-K with respect to Barclays' motion because plaintiffs relied on it in their Amended Complaint. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 884 (S.D. Tex. 2001).

complaint on behalf of one of the named plaintiffs here, asserting the very claims now belatedly asserted against Barclays Capital and Barclays Bank. *See Amalgamated Bank* v. *Lay*, No. H-01-4198 (S.D. Tex.).

In any event, Barclays Capital and Barclays Bank should not be estopped from asserting their statutes of limitations defenses because no action (or inaction) of any Barclays defendant induced the plaintiffs to delay filing the Amended Complaint until after the one-year limitations periods had expired. As discussed above, when plaintiffs filed the earlier Consolidated Complaint on April 8, 2002, they had actual notice of Barclays Capital's and Barclays Bank's involvement in the matters that now form the basis of the claims asserted in the Amended Complaint. Moreover, in Barclays PLC's Answer to the Consolidated Complaint — filed on January 7, 2003, over 4 months before plaintiffs filed the Amended Complaint — Barclays PLC specifically identified the Barclays entities that participated in the transactions alleged in the Consolidated Complaint, including Barclays Capital and Barclays Bank. (*See, e.g.*, Barclays Ans. at 2 n.1 & ¶¶ 10, 22, 48-49, 288, 438-440, 750-755, 758, 806, 868, 946.) Furthermore, on April 25, 2003, more than two weeks after the limitations period expired at the very latest, plaintiffs still had not yet decided whether to add new parties. (*See* Lead Plaintiff's Mot. for Leave To File the Am. Compl. at 1 ("Lead Plaintiff is *considering* adding new parties to the amended complaint.")) (emphasis added). In light of all this, plaintiffs' assertion that any Barclays entity was "silent" from January until April 2003 and somehow "induced" plaintiffs not to file their Amended Complaint is simply wrong and should be rejected. (Opp. Mem. at 15.)

C. The Claims Asserted in the Amended Complaint Against Barclays Capital and Barclays Bank Do Not "Relate Back" to the Date of the Filing of the Consolidated Complaint Under Rule 15(c)(3).

Plaintiffs cannot salvage their untimely claims with "relation back" under Rule 15(c)(3).[5] Plaintiffs erroneously contend that Rule 15(c)(3) can be used to add any parties at any time after the expiration of the applicable statute of limitations if plaintiffs lacked knowledge as to the identity of all potential defendants. (*See* Opp. Mem. at 18 n.13.) This contradicts Fifth Circuit precedent. Leaving aside the correction of a misnomer (which plaintiffs do not contend applies here), Rule 15(c)(3) applies only where plaintiff has mistakenly sued the wrong defendant and thereafter amends the complaint to *substitute* the proper party for the mistakenly named defendant. *See* *Jacobsen* v. *Osborne*, 133 F.3d 315, 320 (5th Cir. 1998).[6] Plaintiffs' assertions that they added Barclays Capital and Barclays Bank as defendants to correct a "factual mistake as to identity" and/or "potential mistake of law" (Opp. Mem. at 25-32), are not sufficient to trigger relation back under Rule 15(c)(3).

---

[5] Barclays Capital and Barclays Bank did not argue as a basis for dismissal that they did not have notice of this litigation. Thus, plaintiffs' lengthy argument on this point (*See* Opp. Mem. at 19-24) is irrelevant to the issues presented by Barclays' motion to dismiss.

[6] The one case cited by plaintiffs on this point actually contradicts their position. In *Roberts* v. *Orleans Parish Medical Staff*, the court allowed an amendment to correct a misnomer and also permitted an amendment adding certain parties where the amendment was filed within the limitations period but misfiled by the clerk of court. *See Roberts* v. *Orleans Parish Medical Staff*, Civ.A. No. 99-2266, 2002 U.S. Dist. Lexis 9660, at *17 (E.D. La. 2002). However, the court *denied* plaintiff's attempt to add other parties first named as defendants outside the limitations period, finding that there was "no basis" for relation back under Rule 15. *Id.* at 20.

1. Plaintiffs' Claimed Lack of Knowledge Is Not a Mistake Under Rule 15(c)(3).

Plaintiffs contend that they amended the Consolidated Complaint to add Barclays Bank and Barclays Capital to correct a "factual mistake as to identity." (Opp. Mem. at 25.) Nonetheless, plaintiffs do not state anywhere in their 115-page brief that they were unaware of Barclays Bank's and Barclays Capital's participation in the alleged fraud when they filed the Consolidated Complaint on April 8, 2002. That is because plaintiffs' own Consolidated Complaint demonstrates that they were aware. Barclays Capital was actually mentioned in the Consolidated Complaint, and Barclays Bank was identified in the Powers Report, which was cited numerous times in the Consolidated Complaint.[7] Further, plaintiffs do not provide a single detail about their supposed mistake, but instead weakly assert that "Barclays has at least 44 publicly-known subsidiaries, nearly all of which bear the name 'Barclays'" as their rationale for naming the parent company rather than the entity actually involved in the transaction, despite the fact that this entity (Barclays Bank) had been publicly identified months before they filed the Consolidated Complaint in a document that plaintiffs repeatedly cited in that very pleading. (*See* Opp. Mem. at 29.)

Additionally, plaintiffs make no attempt to explain why, despite their "mistake," they continue to press their claims against Barclays PLC. *See, e.g.*, *Kemp Industries, Inc.* v. *Safety Light Corp.*, Civ.A. No. 92-95, 1994 WL 532130, at *14 (D.N.J.

[7] Indeed, plaintiffs' allegations concerning Barclays' role in the Chewco transaction are largely copied — with added inaccuracies and embellishment — from the Powers Report. (*Compare* Consol. Compl. ¶¶ 435-447, 756-759 *with* Powers Report at 43-54.)

Jan. 25, 1994) (the "fact that Plaintiffs continued, and still continue, to assert their claims against Safety Light after Prudential had been named undercuts any contention that Safety Light was mistakenly named in the Complaint"); *see also Slater* v. *Skyhawk Transportation, Inc.*, 187 F.R.D. 185, 196 (D.N.J. 1999) (mistake element not satisfied where plaintiff does not seek to substitute one defendant for another but instead seeks to add an additional defendant).

Finally, there would be no relation back even if plaintiffs had not been aware of the identities and involvement of Barclays Capital and Barclays Bank more than one year before plaintiffs sued them. In the absence of misnomer or mistaken identity, lack of knowledge as to the identity of the "proper" parties is not a "mistake" under Rule 15(c)(3). *See Duckworth* v. *Brunswick Corp.*, No. Civ.A. 700CV120R, 2001 WL 406234, at *1 (N.D. Tex. April 17, 2001) (the "goal of Rule 15(c)(3) is to allow parties to correct their mistakes, not to allow them an indefinite amount of time in which to discover who the proper parties actually are."); *see also Wilson* v. *United States*, 23 F.3d 559, 563 (1st Cir. 1994) (lack of knowledge not a mistake); *accord Barrow* v. *Wethersfield Police Dept.*, 66 F.3d 466, 470 (2nd Cir. 1996); *Baskin* v. *City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998).

2. Plaintiffs' Flawed Legal Strategy Is Not a Mistake under Rule 15(c)(3).

Plaintiffs assert that their decision to sue only the parent companies of the financial institutions is "a potential mistake of law" (Opp. Mem. at 29), because their theory of primary liability of parent companies based on the acts of subsidiaries could

ultimately fail. (*See id.* at 30.) This "potential mistake" is not a cognizable mistake under Rule 15(c)(3) either.

The objective of Rule 15(c)(3) "is clearly not to absolve a plaintiff of the consequences of a deliberate strategic decision to exclude a particular plaintiff or defendant." *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, No. Civ. 6879, 1994 WL 324018, at *3 (S.D.N.Y. July 6, 1994). Plaintiffs cite two cases for the proposition that a "mistake of law" of the sort they claim "potentially" to have made can be a "mistake" under Rule 15(c)(3). (Opp. Mem. at 32.) Both are outside this Circuit and contrary to controlling precedent. But a case from this District goes the other way, and is particularly instructive here. In *Gutierrez* v. *Raymond International, Inc.*, 86 F.R.D. 684, 685 (S.D. Tex. 1980), plaintiffs sued one company of a conglomerate and omitted from the complaint two other potentially culpable affiliates based on the theory that the defendant company was the alter ego of these unnamed affiliates. *Id.* at 684. After the court dismissed the defendant company for lack of personal jurisdiction, plaintiffs sought leave to amend the complaint to add as defendants the two previously-unnamed affiliates *after* the applicable limitations period had expired. *Id.* at 685. Plaintiffs argued that the amendment should relate back to the date of the filing of the initial complaint under Rule 15(c) because they were mistaken as to their legal theory. The court rejected this argument, reasoning that plaintiffs "cannot now claim that it was all a mistake" because "[p]laintiffs made a deliberate tactical decision" to sue only one company based on an alter ego theory even though it had notice of the other potential defendants. *Id.*

Here, similarly, when plaintiffs filed their Consolidated Complaint, they were aware of Barclays Capital's and Barclays Bank's participation in the transactions

alleged in the Consolidated Complaint (*see supra* at 4), but apparently chose to sue only the parent company (Barclays PLC) on some "enterprise liability" or similar theory. (*See* Opp. Mem. at 29-30; *see also* Consol. Comp. ¶ 106 ("Defendant Barclays PLC is a large integrated financial services institution that through its controlled subsidiaries and divisions . . .).) Because "plaintiffs made a deliberate tactical decision" to sue only Barclays PLC, "[t]hey cannot now claim that it was all a mistake" to omit Barclays Capital and Barclays Bank from the Consolidated Complaint.[8] *See Gutierrez*, 86 F.R.D. at 685.

II. ALL OF PLAINTIFFS' CLAIMS CONCERNING THE YOSEMITE SECURITIES OFFERING SHOULD BE DISMISSED.

A. No Named Plaintiff Has Standing to Assert the Claims.

Plaintiffs concede that no named plaintiff purchased any of the LEOs sold in the Yosemite Securities Offering. (*See* Opp. Mem. at 38.) Consequently, the Court should dismiss, for lack of standing, the Sections 12(a)(2) and 15 claims asserted against Barclays Capital and Barclays PLC, respectively, as well as all Rule 10b-5 claims insofar as they relate to the Yosemite Securities Offering. *See, e.g., O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class

[8] The same facts showing (a) that plaintiffs were aware before filing their earlier Consolidated Complaint of Barclays Capital's and Barclays Bank's involvement in the Enron matters at issue here, and (b) that plaintiffs therefore made no mistake in not suing those entities earlier (*see supra* 9-13 and Barclays' Opening Brief at 14-15), also demonstrate that neither Barclays entity knew or had reason to know, as required by Rule 15(c)(3), that the only reason they were not named in the earlier Complaint was because of a mistake.

establishes the requisite [standing], none may seek relief on behalf of himself or any other member of the class."); *see also In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing 12(a)(2) claims because "[p]laintiffs . . . do not allege that any named plaintiff purchased or acquired any of the Paracelsus notes at issue").

Plaintiffs assert that the Court should defer ruling on the constitutional standing issue until all class certification issues have been resolved. (*See* Opp. Mem. at 38, 46-48.) However, standing is a jurisdictional issue that needs to be decided now. The Fifth Circuit has clearly held that the "constitutional threshold" of standing must be satisfied before the Court considers any class issues:

> Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue. If the plaintiff has no standing individually, no case or controversy arises. This constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23.

Brown v. *Sibley*, 650 F.2d 760, 771 (5th Cir. 1981); *see also Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (explaining "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (citations omitted).

Plaintiffs suggest in a footnote (Opp. Memo at 46 n.38) that their standing problem can be resolved by the prospective intervention of a party that purchased

"Yosemite notes."[9] But plaintiffs do not provide any legal authority to support their argument that constitutional standing can be created by merely suggesting that somebody else might come forward and seek to intervene in the future. Indeed, such a rule would eviscerate the standing doctrine. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion) (standing is a "threshold" inquiry). Therefore, it is not surprising that the case plaintiffs cite on this point only addresses issues of class certification, not constitutional standing. *See Longden* v. *Sunderman*, 123 F.R.D. 547 (N.D. Tex. 1988). Indeed, the *Longden* decision does not indicate that any standing issues were even raised in the litigation.

B. The Yosemite Securities Offering Was Not Made Pursuant to a Prospectus.

As discussed in Barclays' opening brief (at 17-18), plaintiffs did not allege anywhere in the Amended Complaint that the Yosemite Securities Offering was a public offering or that it involved a prospectus. (*See* Am. Compl. ¶¶ 641.12-641.16.) Plaintiffs now attempt to remedy this pleading deficiency by asserting for the first time in their opposition brief that that the Yosemite Securities Offering was public because the offering document was widely disseminated in the United States, the United Kingdom and European Union. (*See* Opp. Memo at 42.) These assertions were not pleaded and should be disregarded in this motion. *See Griffin* v. *PaineWebber, Inc.*, 84 F. Supp. 2d

[9] Further highlighting the problem with this haphazard approach to pleading, plaintiffs do not specify which "Yosemite notes" their prospective intervenor purchased, even though their claims are based on several different note offerings with different characteristics, only one of which is alleged to have involved Barclays. (See Am. Compl. ¶¶ 641.7-641.16.)

508, 515 (S.D.N.Y. 2000) ("Unfortunately for plaintiff, several of these allegations do not appear in the Complaint. That they appear in Plaintiff's memorandum of law in opposition to these motions to dismiss does not cure the defect.").[10]

Plaintiffs also ignore that the offerees in the Yosemite Securities Offering were a select group of sophisticated investors, which refutes plaintiffs' argument that the offering may be characterized as "public." (Yosemite Offering Memorandum, Hurwitz Aff., Exh. C, at iii, 54.); *see Swenson* v. *Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980) (noting that "ultimate issue in determining [whether an offering is private or public] is 'whether the particular class of persons affected need the protection of the Act'") (citation omitted). For these reasons, the Section 12(a)(2) and 15 claims asserted in the Amended Complaint against Barclays Capital and Barclays PLC, respectively, should be dismissed.

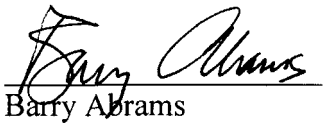
[10] For the reasons stated in J.P. Morgan's reply in further support of their motion to dismiss, which are expressly incorporated herein, plaintiffs' allegations that the LEOs from the Yosemite Securities Offering were later listed on the Luxembourg stock exchange are irrelevant to the question whether the LEOs were sold by means of a prospectus. (*See* J.P. Morgan Reply at II C.)

CONCLUSION

For the foregoing reasons and the reasons stated in Barclays' opening brief, this Court should dismiss with prejudice (i) all claims asserted against Barclays Bank and Barclays Capital, and (ii) the "controlling person" claims asserted against Barclays PLC under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act.

Dated: July 31, 2003
Houston, Texas

Respectfully submitted,



Barry Abrams
(Attorney-in-Charge)
Southern District I.D. No. 2138
State Bar No. 00822700
ABRAMS SCOTT & BICKELY, L.L.P.
700 Louisiana, Suite 1800
Houston, Texas 77002
(713) 228-6601
Facsimile: (713) 228-6605

David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
Adam R. Brebner
Steven J. Purcell
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Facsimile: (212) 558-3588

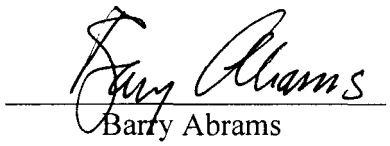
Attorneys for Defendants Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum of Law in Further Support of Motion to Dismiss of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. has been served by sending a copy via electronic mail to serve@ESL3624.com on this 31st day of July, 2003.

I further certify that a copy of the foregoing Reply Memorandum of Law in Further Support of Motion to Dismiss of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. has been served, on this 31st day of July, 2003, via overnight mail on:

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004



Barry Abrams